STATE OF MICHIGAN

COURT OF APPEALS

DONALD S. DURANT, et al,

Plaintiffs,

v

STATE OF MICHIGAN, DEPARTMENT OF EDUCATION, STATE OF MICHIGAN, DEPARTMENT OF MANAGEMENT AND BUDGET, and TREASURER OF THE STATE OF MICHIGAN,

Defendants.

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Before: Neff, P.J., and Sawyer and Fitzgerald, JJ.

SAWYER, J.

This original action,[1] commonly referred to as "*Durant III*," requires this Court to revisit and reexamine the interplay between Const 1963, art 9, § 29 (the Headlee Amendment), Const 1963, art 9, § 11 (Proposal A), and the State School Aid Act, MCL 388.1601 *et seq.*, as amended by 2000 PA 297, as well as to expand on this Court's *Durant II* decision, *Durant v Michigan (On Remand)*, 238 Mich App 185; 605 NW2d 66 (1999), vacated in part on other grounds and remanded, reconsideration den 462 Mich 882 (2000).

In response to this Court's decision in *Durant II*, the Legislature enacted 2000 PA 297. Plaintiffs now challenge the constitutionality of that act. For the reasons expressed below, we conclude that 2000 PA 297 is constitutional.

2000 PA 297 creates a tripartite funding scheme the parties refer to as either the "three bucket" or the "three pot" approach. The state provides an overview of this approach in its brief in opposition to plaintiffs' motion for summary disposition as follows:

[1] Lead plaintiff Donald S. Durant, who has lent his name to a series of lawsuits brought over the past twenty years to enforce the provisions of the Headlee Amendment, Const 1963, art 9, §§ 25-31, died in March 2001, during the pendency of this action.

1. Allocate the appropriation for the state share of the Proposal A obligation at the 1994-95 level. (§ 22a).

2. Allocate the appropriation for the Headlee Amendment obligations at the state financed proportions for special education and special education transportation. (§ 51c).

3. Calculate the amount under the former appropriation sections (§§ 20, 20j, 51a(2), 51a(3) and 51a(12)).

4. The appropriations made under Step 1 (§ 22a) and Step 2 (§ 51c) are subtracted from the total in step 3.

5. The remainder equals the § 22b appropriation, an additional discretionary payment.

Sum of former appropriation sections

- 22a appropriation (Proposal A obligation)

- 51c appropriation (Headlee Amendment obligation)

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= 22b appropriation.

A more detailed explanation of this three-bucket funding method is set forth in a February 6, 2001, Department of Education Bulletin as follows:

PAYMENT MECHANISM UNDER THE *DURANT* SOLUTION (*NEW* Sections 22a, 22b, and 51c)

Beginning in FY2001, foundation allowance payments and supplemental payments to local school districts and PSAs will no longer be paid out of Section 20 and 20j and special education payments to those entities will no longer be paid out of Section 51a. Rather, the amounts calculated pursuant to those sections will be used to determine the amount of state payments under NEW Section 22b. This payment mechanism, described below, has been designed to demonstrate the State's compliance with the foundation allowance guarantee under Proposal A and the minimum special education reimbursement obligation pursuant to the Headlee amendment:

Section 22a allocates a per pupil amount to meet the Proposal A guarantee of a FY95 foundation allowance per pupil.

Section 51c allocates an amount to meet the Headlee obligation equal to 28.6138% of a district's special education costs plus 70.4165% of the district's special education transportation costs.

Section 22b allocates a discretionary payment equal to the sum of the calculated amounts under Sections 20, 20j, 51a(2), 51a(3), and 51a(12) minus the amounts paid in Sections 22a and 51c.

NEW Section 22a allocates to each local school district, university school, and public academy that operated during FY95 and is in operation in the current year an amount per pupil sufficient to guarantee revenue in the amount of its FY95 total state and local per pupil revenue for school operating purposes, as guaranteed under Section 11 of Article IX of the State Constitution of 1963 ("Proposal A"). The payments under this section for *a local school district* will be calculated by subtracting from the FY95 foundation allowance or $6,500.00, whichever is less, the current year per pupil local operating revenue from the nonhomestead millage levy. The figure used for the current year per pupil local operating revenue is equal to the current year nonhomestead taxable value (less any captured assessed valuation under TIFA, LDFA, DDA, or Brownfield), multiplied by the lesser of 18 mills or the number of mills levied by the district for FY94, divided by the district's current year membership. If a *hold harmless district's* FY95 hold harmless millage rate, as certified by the Department of Treasury for the 1994 tax year, multiplied by the district's current year taxable value per pupil no longer generates the full hold harmless amount per pupil (that is, the difference between the district's FY95 foundation allowance and $6,500.00), the amount paid under Section 22a will be increased to include that shortfall. The per pupil payments under this section for a *university school or PSA* that was in operation in FY95 and is operating in the current year will be equal to the university school's or PSA's FY95 per pupil payment under Section 20.

NEW Section 51c allocates to districts (including a university school and PSAs) an amount equal to 28.6138% of total approved costs of special education (excluding costs reimbursed under section 53a), and 70.4165% of total approved costs of special education transportation.

NEW Section 22b allocates to districts (including a university school and PSAs) an amount equal to the difference between the sum of the calculations under Section 20 (foundation allowance), 20j (hold harmless supplemental), 51a(2) (special education foundation allowances and "categorical" payments), 51a(3) (special education "hold harmless"), and 51a(12) (other special education foundation allowances); minus the payments made under new Sections 22a and 51c. These Section 22b payments are not to be considered per pupil revenue for school operating purposes under Section 11 of Article IX of the State Constitution. Finally, in order to receive these funds, districts are required to administer a standardized department-approved assessment of basic educational skills for pupils in grades first through fifth.

The practical effect of this three-bucket approach is that, although subsection 20(1) of 2000 PA 297 sets the basic foundation allowance at $5,700 per membership pupil for 1999-2000, at $6,000 per membership pupil for 2000-01, at $6,300 per membership pupil for 2001-02, and at $6,700 per membership pupil for 2002-03, the state is calculating and funding its obligation under art 9, § 11 at a level not less than "the 1994-95 total state and local per pupil revenue for school operating purposes" for each particular school district. The per membership pupil amount for the 1994-95 fiscal year was $5,000. Although the parties are less than clear on this point, it appears that the funds that compose the difference between the 1994-95 foundation allowance and the basic foundation allowances specified in subsection 20(1) of 2000 PA 297, other than the Headlee obligation allocation, are poured into the discretionary funds bucket.

This leads us to the current litigation. Plaintiffs are 458 taxpayers, 423 school districts, and 33 intermediate school districts, who have commenced this original action pursuant to Const 1963, art 9, § 32, MCR 2.605, and MCR 7.216(A)(7), seeking both a judgment declaring that the state has underfunded its constitutional obligation under art 9, § 29 and a money judgment in the amount of this underfunding. The gravamen of plaintiffs' claim is set forth in paragraphs 23 and 24 of count I of their second amended complaint:

> 23. However, in enacting 2000 PA 297, the defendant state has again utilized revenue guaranteed to school districts in Michigan for general or unrestricted school operating purposes, *i.e.*, "foundation allowance revenue," pursuant to Proposal A in order to satisfy the state's independent and additional funding obligation to those school districts under § 29 of the Headlee Amendment in order to defray the costs incurred by those school districts to provide special education programs and services, inclusive of special education transportation services, in the proportion which applied in 1978 when the Amendment was adopted.
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> 24. By operation of 2000 PA 297, school districts in Michigan were unconstitutionally underfunded Three Hundred Ninety-Six Million Five Hundred Thirty Thousand Two Hundred Four Dollars ($396,530,204.00) for the 1999-2000 school year and are presently being underfunded Four Hundred Seventeen Million Four Hundred Three Thousand One Hundred Fifty-Eight Dollars ($417,403,158) for the 2000-2001 school year and will be underfunded Four Hundred Fifty-Two Million One Hundred Thirty-Three Thousand Two Hundred Fifty Dollars ($452,133,250.00) for the 2001-2002 school year and will be underfunded Four Hundred Sixty-Six Million Ninety-Five Thousand One Hundred Twenty-Three Dollars ($466,095,123.00) for the 2002-2003 school year because per pupil revenue guaranteed to school districts in Michigan for general or unrestricted school operating purposes pursuant to Proposal A, Const 1963, art 9, § 11, *as amended*, has been allocated or transferred in order to satisfy the state's independent and additional funding obligation to those school districts pursuant to § 29 of the Headlee Amendment, Const 1963, art 9, § 29, for the costs incurred to provide special education programs and services, inclusive of special education

transportation services, in the proportion which applied in 1978 when the Amendment was adopted.

The essence of plaintiffs' argument is that once the Legislature has allocated money to the "foundation allowance," that money is unavailable to satisfy the state's obligations under the Headlee Amendment even if that foundation allowance is greater that the minimum required under art 9, § 11. The essence of defendants' argument is that funds allocated to the "foundation allowance" may be used to meet the state's obligations under both Proposal A and the Headlee Amendment as long as that foundation allowance is equal to, or greater than, the sum of the state's obligations under Proposal A and the Headlee Amendment. We agree with defendants.

Plaintiffs assert with dispositive conviction that the fact that each school district will receive exactly the same amount that it would have received under the funding scheme struck down in *Durant II* is proof certain that the funding scheme employed in 2000 PA 297 is nothing more than a "shell game" that is equally unconstitutional. However, even if true, this does not render the three-bucket funding scheme unconstitutional per se. The fact that each school district might receive the same amount of funding under 2000 PA 297 that it received under 1997 PA 142 and 1998 PA 339 is of no moment with regard to the constitutionality of the funding scheme.

Durant II stands generally for the propositions that Michigan's Constitution prohibits the Legislature from using the per pupil funding guaranteed by Proposal A to satisfy the state's obligation under the Headlee Amendment and that such a use of per pupil funding guaranteed by Proposal A not only violates art 9, § 11, but also results in an underfunding of the state's obligation under the Headlee Amendment in the amount of Proposal A funds dedicated to satisfying the state's Headlee Amendment obligation. *Durant II*, 238 Mich App 189-190, 212-213. Plaintiffs now assert that *Durant II* stands for the proposition that Proposal A constitutionally guarantees that each school district will receive the entire per pupil foundation allowance fixed in subsection 20(1) of 2000 PA 297 as unrestricted per pupil funding to reimburse general school operating costs exclusive of the costs of special education activities, services, and transportation. The state asserts that the Proposal A amendment of art 9, § 11 guarantees only that local school districts will receive combined state and local per pupil revenues for school operating purposes that are not less than the 1994-95 level. Accordingly, the key question before this Court for resolution is what is the extent of the state's funding obligation under art 9, § 11, a question neither raised by the parties nor directly addressed by this Court in *Durant II*.

If plaintiffs offer the correct construction of art 9, § 11, then the state has underfunded its Proposal A obligation and is precluded from pouring into the discretionary use bucket any portion of the foundation allowance fixed in subsection 20(1) and from using any portion of that foundation allowance to fund the state's Headlee Amendment obligation. If the state is correct, then any use of that portion of the per pupil foundation allowance fixed in subsection 20(1) of 2000 PA 297 that remains after the state has funded the local school districts at the 1994-95 level to fund the state's Headlee Amendment obligation is not constitutionally prohibited.

At issue is the meaning of the following constitutional language:

> Beginning in the 1995-96 state fiscal year and each state fiscal year after 1995-96, the state shall guarantee that the total state and local per pupil revenue for school operating purposes for each local school district shall not be less than the 1994-95 total state and local per pupil revenue for school operating purposes for that local school district . . . . [Const 1963, art 9, § 11.]

The rule of "common understanding" is the primary rule of constitutional interpretation. *Durant II*, 238 Mich App 210. The parameters of this rule have been articulated as follows:

> "'A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. "For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark and abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed."'" [*Durant v Michigan*, 456 Mich 175, 192; 566 NW2d 272 (1997) (*Durant I*), quoting 1 Cooley, Constitutional Limitations (8th ed), p 143.]

Although evidence of the common understanding of the voters may be ascertained from the " 'times and circumstances' " surrounding the ratification of the constitutional provision and the purposes sought to be accomplished, *Durant I*, 456 Mich 192, quoting *People v Harding*, 53 Mich 481, 485; 19 NW 155 (1884); *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 745; 330 NW2d 346 (1982), these tools are used only when necessary to clarify the meaning of the constitutional language in the absence of guidance from the language itself. *Committee for Constitutional Reform v Secretary of State*, 425 Mich 336, 340-341; 389 NW2d 430 (1986); *Univ of Michigan Regents v Michigan*, 395 Mich 52, 60; 235 NW2d 1 (1975).

The language employed in art 9, § 11 is clear and uncomplicated. Assigning each word and phrase its common meaning, the great mass of the people would have understood from the amending language that art 9, § 11 "guarantees" that the state will provide each "local school district" with a minimum or base level of funding that cannot be less than "the 1994-95 total state and local per pupil revenue for school operating purposes . . . ." This minimum level of funding is to be calculated on the basis of the number of pupils to which the individual school districts provide educational services and instruction, as reflected by the common understanding of the phrase "per pupil revenue." Although various state officials may have represented to the public that the foundation allowance constitutes the funding guaranteed under Proposal A, the term foundation allowance appears nowhere in the text of art 9, § 11. Moreover, this Court in *Durant II*, 238 Mich App 191, never held that it was the foundation allowance that was constitutionally guaranteed, but did indicate, instead, that art 9, § 11 guaranteed only a "specific base level of unrestricted aid per pupil . . . ." *Durant II*, 238 Mich App 212-213.

In light of the clear language of art 9, § 11, the construction of art 9, § 11 advocated by the schools would impose limitations on the Legislature's appropriation discretion not envisioned by Proposal A, and this Court may not construe a constitutional provision to impose limitations on the Legislature not intended by the ratifiers of the constitutional provision. *Judicial Attorneys Ass'n v Michigan*, 460 Mich 590, 604-607; 597 NW2d 113 (1999); *Durant II*, 238 Mich App 208. There is nothing in the plain language of art 9, § 11 that would constitutionally preclude the Legislature from establishing a foundation allowance and allocating from this amount an amount sufficient to fund the base level of per pupil funding guaranteed by art 9, § 11 and then pouring the remaining funds allocated to the foundation allowance that exceed the base level of per pupil funding guaranteed by art 9, § 11 into the discretionary use bucket or the Headlee allocation bucket. To the extent that the three-bucket funding scheme has shortcomings of a nonconstitutional nature, such inequities are not a matter for this Court to redress, but instead, must be left to what redress, if any, may be achieved through the political process. *Judicial Attorneys Ass'n, supra* at 604-605.

In short, the constitution imposes two obligations on the Legislature with respect to school funding. First, under Proposal A, it must provide funding at the minimum level provided in 1994-95, or approximately $5,000 per pupil. Second, under the Headlee Amendment, the state is obligated to provide certain special education funding in addition to the minimum funding of $5,000 per pupil. These sums added together represent the total minimum funding obligation of the state under the constitution. If the amount appropriated by the Legislature meets that minimum amount, then the constitution is satisfied.

For example, consider the hypothetical XYZ School District, which has one hundred students. The Legislature must appropriate under Proposal A a minimum of $500,000 (one hundred pupils times $5,000 per pupil to meet the 1994-95 funding level obligation). Additionally, let us say that the state's special education funding required by the Headlee Amendment for the XYZ School District is $50,000. In such case, the Legislature would meet its constitutional obligations under Proposal A and the Headlee Amendment as long as it appropriates a minimum of $550,000 to the XYZ School District ($500,000 under Proposal A plus $50,000 under the Headlee Amendment).

Plaintiffs would have us look at the label, not the substance, placed on various school funding components by the Legislature. That is, the essence of their position is that, once the Legislature has labeled money "foundation allowance," that money is unavailable to satisfy the Legislature's obligations under the Headlee Amendment *even where that "foundation allowance" is in excess of the minimum required by Proposal A.* Not only does this argument elevate the label over the substance, it also completely ignores the fact that art 9, § 11 does not even employ the term "foundation allowance." The label itself is a creation of the Legislature.

We must look past the labels and grasp the substance. The substance of the constitution is that the Legislature must appropriate a certain minimum amount of money to each school district on the basis of the 1994-95 funding levels plus additional obligations imposed under the Headlee Amendment. The substance of 2000 PA 297 is that the Legislature has met this obligation. And just as the Legislature may not employ labels at the expense of substance to

avoid restrictions imposed by the constitution, neither can this Court employ labels in the absence of substance to create mandates not found in the constitution.

In short, it matters not what label the Legislature chooses to place on various funding components or whether there is a commingling of funds under common labels. What matters is whether the total appropriation meets or exceeds the minimum funding levels imposed by Proposal A and the Headlee Amendment. 2000 PA 297 achieves that result. It is, therefore, constitutional.

In light of our resolution of this issue, we need not address the procedural issues raised by the parties.

Summary disposition is granted to defendants. No costs, a question of public importance being involved.

/s/ David H. Sawyer